No. 85-1581

In the Supreme Court of the United States

OCTOBER TERM, 1986

RICHARD SOLORIO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ of Certiorari to the United States Court of Military Appeals

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BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. May a court find that an offense committed off-base at a place where there is no military post or enclave is service-connected simply because of the civilian dependent status of the victim?

II. May a court depart from its precedents setting out the constitutional limits of court-martial jurisdiction over offenses against civilian dependents and apply a more expansive interpretation in the very same case?

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OPINIONS BELOW

The judgment and opinion of the Court of Military Appeals (Pet. App. A, pp. 1a-17a) is reported at 21 M.J. 251 (C.M.A. 1986). The judgment and opinion of the Coast Guard Court of Military Review (Pet. App. B, pp. 18a-42a) is reported at 21 M.J. 512 (C.G.C.M.R. 1985).

JURISDICTION

The judgment and opinion of the Court of Military Appeals was entered on January 27, 1986. The petition for a writ of certiorari was filed on March 26, 1986, and was granted on June 16, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1259 (Supp. II 1984).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Constitution of the United States provides:

> Article III, § 2, Cl. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."
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> Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be . . . deprived of life, liberty, or property, without due process of law. . . ."
>
> Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984, provide as follows:

> Rule 201(b): "Requisites of court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:
>
> * * * *
>
> (5) The offense must be subject to court-martial jurisdiction.
>
> Discussion
>
> *See* R.C.M. 203. The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. . . ."
>
> Rule 203: "Jurisdiction over the offense. To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war."

The discussion and analysis of Rule 203, are printed at Pet. App. C, pp. 43a-48a, and Pet. App. D, pp. 49a-54a, respectively.

STATEMENT OF THE CASE

The petitioner, an enlisted man in the Coast Guard, was charged with fourteen specifications alleging indecent liberties, lascivious acts and an indecent assault in violation of Article 134, Uniform Code of Military Justice [UCMJ],[1] six specifications alleging assault in violation of Article 128, UCMJ,[2] and one specification alleging an attempted rape in violation of Article 80, UCMJ.[3] J.A. 6-15. At a pre-trial hearing on June 3 and 4, 1985, petitioner made a motion to dismiss all the charges and specifications alleging assaults and the attempted rape, and seven on the specifications alleging indecent liberties, lascivious acts and the indecent assault in violation of Article 134, UCMJ, for lack of subject-matter jurisdiction. J.A. 68.

The fourteen specifications petitioner moved to dismiss all alleged offenses at Juneau, Alaska. J.A. 8-15. The seven remaining specifications alleged similar, but unrelated, offenses at Governors Island, New York, a Coast Guard base. J.A. 6-8.

After hearing evidence and argument on the motion, the trial judge dismissed the fourteen specifications alleging offenses at Juneau and the charges of violating Article 128 and Article 80, UCMJ, because the offenses lacked service-connection. J.A. 195. The trial judge made findings of fact[4] on the record, J.A. 195-200, and prior to authenticating the record attached supplemental findings of fact. Pet. App. F, pp. 62a-63a.

The dismissed charges and specifications allege offenses against two girls. J.A. 8-15. The fathers of these girls

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[1] 10 U.S.C. § 934 (1982).

[2] 10 U.S.C. § 928 (1982).

[3] 10 U.S.C. § 880 (1982).

[4] Rule 905(d), Rules for Court-Martial, Manual for Courts-Martial, United States, 1984, requires the military judge to state his essential findings of fact on the record when factual issues are involved in determining a motion.

were, like petitioner, active duty members of the Coast Guard assigned to the staff of the Commander, Seventeenth Coast Guard District. J.A. 48. All the offenses allegedly occurred in petitioner's privately owned home eleven miles from the Federal Office Building in downtown Juneau where he worked. J.A. 8-15 and 50. The alleged victims and their families also lived in civilian housing, there being no government quarters in Juneau for anyone other than the District Commander. J.A. 47-48.

In Juneau at the time of the alleged offenses there was no Coast Guard controlled post or enclave where many service personnel lived and worked. Pet. App. B, note 1 at 20a. The closest equivalent in Juneau was the Coast Guard Station, a 1.3 acre facility with a complement of fourteen enlisted persons. *Id.* Over two hundred Coast Guard military personnel were assigned to the district office, occupying four of the nine floors of the Juneau Federal Office Building, where other Federal agencies are also located. Pet. App. B, note 1 at 21a. The Coast Guard Marine Safety Office situated in a building adjacent to the Federal Office Building had a military complement of seventeen persons. *Id.* With the possible exception of some of the complement of six officers and forty-nine enlisted personnel on the buoy tender berthed at the Coast Guard Station, all of the approximately three hundred Coast Guard military personnel in Juneau lived in the civilian community. *Id.*

A friendship had grown between petitioner and the families of the alleged victims, grounded in one case on the common sporting interests of bowling and basketball, and in the other, on the fortuity of living next door. J.A. 48-49. The alleged victims came to petitioner's home on a regular basis to visit with his two sons. *Id.* Both girls at one time played on a soccer team coached by petitioner and they bowled in a league in which he was active. J.A. 51 and 53. These associations were much more significant than any military relationship between

petitioner and the fathers of the alleged victims, which the trial judge found to be *de minimis*. J.A. 198.

There was no evidence that any of the allegations have become common knowledge, even among the Coast Guard personnel, at Juneau. No allegations were made against petitioner until all parties had been permanently transferred to duty stations outside Alaska. Pet. App. B, 21a. Petitioner was stationed at Juneau from November 1980 to June 1984. J.A. 50. Warrant Officer Johnson and his family, including Amber Johnson, left Juneau in June 1983. J.A. 48. Amber did not make any allegations against petitioner until March 1985. J.A. 107. Petty Officer Grantz and his family, including Jennifer Grantz, left Juneau in June 1984. J.A. 48. Jennifer did not make any allegations against petitioner until about April 1985. J.A. 123.

The Alaska prosecutor, in a letter to the Coast Guard, stated "that at this time, subject to future evaluation or developments, that the Department of Law, Criminal Division, State of Alaska, will defer prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutional arm of the Coast Guard." Opp. 1a. However, there was also evidence that the State of Alaska had recently prosecuted two similar cases involving members of the Coast Guard with results highly satisfactory to the Coast Guard. J.A. 65-66. And at trial, Special Agent Gary Smith testified that the State of Alaska was continuing to investigate allegations that the accused had sexually abused the children of other civilians still living in Juneau. J.A. 149-150.

The accused is presently assigned to Coast Guard Group New York at Governors Island, New York, where he lives in Government quarters and where the instant general court-martial was convened. J.A. 50.

In his findings of fact, the trial judge addressed the twelve *Relford* factors [5] and the nine additional *Relford*

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[5] *See Relford v. Commandant*, 401 U.S. 355, 365 (1971), and *infra* note 18.

considerations,[6] and found that none of them supported a finding of service-connection. J.A. 196-198. Additionally, the military judge considered, among other things, the military relationship between petitioner and the servicemember fathers of the alleged victims, the effect of the alleged offenses on morale, discipline or effectiveness within the military community in Juneau, the reputation of the Coast Guard with the civilian community in Juneau, the relation of the offenses alleged to have been committed in Alaska to the offenses alleged to have been committed in New York, and the impact of the alleged offenses on the servicemember fathers of the alleged victims and through them on the service. J.A. 198-200; Pet. App. F, pp. 62a-63a. The military judge found that the asserted impact upon the service was too remote and indirect to support service-connection.[7]

The government appealed the military judge's ruling to the Coast Guard Court of Military Review and that court granted the government's appeal, reversing the military judge. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985) Pet. App. B, pp. 18a-42a. Before the Coast Guard Court of Military Review petitioner argued, in opposition to the government's appeal, that the military judge had properly applied the service-connection test required by *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), and properly found that the facts of this case did not support subject-matter jurisdiction.

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[6] *See Relford v. Commandant*, 401 U.S. 355, 367-369 (1971), and *infra* note 19.

[7] "In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service-connection. That indirect impact consists of servicemember-parents' preoccupation with family situation affecting the members' performance, some initial counseling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J." Military Judge's Supplemental Findings of Fact, Pet. App. F, pp. 62a-63a.

The United States Court of Miliary Appeals granted review of the Coast Guard Court's decision and affirmed. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), Pet. App. A, pp. 1a-17a. In his petition for grant of review, petitioner argued that the Court of Military Review's decision was incorrect because it had not properly applied the service-connection test required by *O'Callahan*, and *Relford*, and because the military judge had properly found that the facts did not support subject-matter jurisdiction.

The court-martial proceedings went forward on February 18, 1986, and on March 11, 1986, petitioner was convicted of eight of the fourteen specifications alleging offenses in Alaska. Petitioner was also convicted of four of the seven specifications alleging offenses in New York. Petitioner filed a petition for a writ of certiorari on March 26, 1986, and the petition was granted on June 16, 1986.

SUMMARY OF ARGUMENT

I. The decision of the United States Court of Military Appeals should be reversed because it conflicts with this Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), and expands court-martial subject-matter jurisdiction beyond the constitutional limits spelled out in those cases. The Court of Military Appeals has erred because it failed to apply this Court's service-connection test and, instead, applied an incorrect standard which is so pliable it is meaningless.

The service-connection test was first set out in *O'Callahan*. The Court clearly intended the test to balance the military interest in prosecuting a civilian offense at court-martial against the servicemember's interests in the greater constitutional protections of a civilian trial. In *Relford* this Court responded to criticism that "the infinite permutations of possibly relevant factors", which the service-connection test might have included, would create confusion about the limits of court-martial juris-

diction, *see O'Callahan* at 284 (Harlan, J., dissenting); identifying the twelve factors and nine additional considerations that are relevant and significant. By thus limiting the relevant criteria this Court eliminated the danger of confusion and proliferating litigation over court-martial jurisdiction.

The *Relford* service-connection analysis has served as a model for lower courts for over fifteen years and as a result of the consistent application of the *Relford* criteria the concept of service-connection has evolved into a well-defined principle of law. In this case, however, the Court of Military Appeals did not bother with a complete *Relford* analysis. Rather, it principally relied on its holding that, as a matter of law, the effect of petitioner's offenses on the victims' servicemember fathers created an impact on the Coast Guard sufficient to support court-martial jurisdiction. In effect, this holding bases jurisdiction solely on the dependent status of the victims.

No court, applying this Court's *Relford* analysis, has ever found that the dependent status of the victim is, by itself, sufficient to support court-martial jurisdiction. But the Court of Military Appeals has rejected the *Relford* analysis as too inflexible, and in this case it employed its own flexible subject-matter analysis. That analysis is not bound by the result that application of the *Relford* criteria requires, and does not set any limits on other criteria that may be considered. It renders the service-connection test so pliable it is meaningless, and it provides servicemembers no protection of their right to the greater constitutional protections of a civilian trial for civilian offenses.

The Court of Military Appeals' flexible subject-matter jurisdiction analysis invites the confusion of the limits of court-martial jurisdiction that was feared before the *Relford* decision. Moreover, the Court of Military Appeals is using its flexible service-connection test, case by case, to eviscerate the *O'Callahan* and *Relford* decisions. Contrary to the intent of *O'Callahan* and *Relford*, the

Court of Military Appeals' flexible test fails to properly balance the servicemember's interest in a civilian trial against the military interest in trying the offenses at court-martial. The Court of Military Appeals' decision suggests that any asserted impact upon the military, regardless of how remote or indirect, will be sufficient to outweigh the servicemember's constitutional rights.

While *Relford* requires that service-connection be determined on an *ad hoc* basis, according to the facts of each case, this decision permits military courts to find an offense by its nature, *per se*, service-connected. This decision cannot be limited to child sexual abuse cases, because the psychological effect on the victim and the victim's family, and the impact on the military, will be the same whenever any serious crime is committed by a servicemember against a military dependent.

The Court of Military Appeals' attempts to justify its departure from this Court's, and its own, precedents are not persuasive. The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Relford* were decided. No developments since then, in the military or society, justify expansion of court-martial jurisdiction over civilian offenses. Our society's increased concern for the victims of crime is no more reason to take the right to a civilian trial away from servicemembers than it is a reason for subjecting civilians to trial by court-martial. Moreover, the State of Alaska has recently enacted statutes protecting the rights of victims, and there is no reason to believe that state officials would have been any less interested than the military in protecting the victims' rights. Finally, the pendency of other military charges and the deferral of the civilian authorities to the military should not be relied upon as major considerations supporting military jurisdiction. The *O'Callahan* and *Relford* decisions properly did not give such factors weight in the service-connection determination. These factors are too easily manipulated and too far removed from the real interests that should be balanced to provide well defined limits on court-martial jurisdiction.

II. The Court of Military Appeals' decision should be reversed because the facts of this case do not demonstrate a military interest that outweighs the petitioner's interest in a civilian trial. The offenses were committed in petitioner's home in the civilian community at Juneau, Alaska. There is no military base or enclave in Juneau where servicemembers and their families live. Virtually all of the members of the Coast Guard stationed in Juneau, and their families, live in the civilian community. Moreover, no allegations were made against petitioner until after he and his victims had left Juneau. As a result, these offenses have not become public knowledge there, even among servicemembers.

These facts made it impossible for the Government to demonstrate any direct or significant impact from these offenses on the Coast Guard. The trial judge correctly found that any impact of the Alaska offenses on the Coast Guard was remote and indirect. He did not base his decision strictly on the twelve *Relford* factors and the nine additional *Relford* considerations. He also focused on whether the military interest in prosecuting these offenses was different from, and greater than, that of civilian courts. The trial judge, nevertheless, found that the Government had failed to meet its burden of proving jurisdiction.

The trial judge's findings aside, application of the *Relford* criteria make it clear that the facts of this case simply cannot support court-martial jurisdiction. None of the *Relford* criteria support subject-matter jurisdiction. The Government failed to prove that these offenses had any impact on the Coast Guard at Juneau or at Governors Island, where petitioner was subsequently assigned. The offenses which petitioner committed on Governors Island, which are not at issue here, are far more likely to have been responsible for any impact on Governors Island than the offenses committed thousands of miles away in Alaska, months before petitioner arrived on Governors Island.

Furthermore, even if it were permissible to ignore the *Relford* criteria where the Government proves a distinct military interest in the offenses that cannot be adequately vindicated in civilian courts, the Government has failed to prove that here. The victims in this case were not servicemembers, and there are no other facts in this case sufficient to support service-connection. There is only evidence that these alleged offenses have had an effect on the victims' fathers, who are servicemembers. The Coast Guard has attempted to bootstrap this single factor into grounds for finding service-connection by asserting every imaginable impact stemming from the effect of these offenses on the victims and their fathers. In fact, however, there has been only a remote and indirect impact on the Coast Guard, and any military interest in these offenses could be adequately vindicated in the civilian courts.

III. This Court should not hesitate to enforce the *O'Callahan* and *Relford* decisions because those decisions strike the proper balance between the servicemember's right to a civilian trial for a civilan offense and the military's interest in discipine. Moreover, the concept of service-connection has evolved into a well-defined principle of law. *O'Callahan* and *Relford* were properly decided because there has been no appreciable cost in terms of military discipline for the servicemember's right to a civilian trial, during the more than fifteen years since those cases were decided. The Court of Military Appeals' decision is incorect, not only because it fails to strike the proper balance between the rights of the servicemember and the proper interests of the military, but also because it conflicts with, and injects unwarranted confusion into, the settled law of subject-matter jurisdiction.

This is not a case like *Goldman v. Weinberger*, —— U.S. ——, 106 S.Ct. 1310 (1986), where this Court might need to try to predict the impact of new limitations on military authority or where respect for Congress' and the President's authority over national defense and

military affairs requires unusual deference to the military. The limits on court-martial subject-matter jurisdiction were set out more than fifteen years ago in the *O'Callahan* and *Relford* decisions, and those decisions have not had an appreciable cost in terms of military discipline. Furthermore, in *O'Callahan*, this Court found that prosecution of offenses that are not service-connected is beyond the scope of Congress' authority over national defense and military affairs, or is at least a constitutionally inappropriate exercise of that authority. Any remaining doubts about the propriety of this Court's subjecting the decision below to rigorous appellate review must give way to the recent judgment of Congress in extending this Court's jurisdiction, for the first time, to cases on appeal from the Court of Military Appeals. *See* Military Justice Act of 1983, Pub.L.No. 98-209, § 10, 97 Stat. 1393, 1405 (1983).

IV. The Court of Military Appeals' decision should be reversed because it departs from its own precedents and applies a more expansive subject-matter jurisdiction test to petitioner. Application to petitioner, in the same case, of this interpretation which expands the reach of the Uniform Code of Military Justice, violates Fifth Amendment due process. *Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964). *Bouie* and *Marks* have held that a court cannot, by reinterpreting the law, do in effect what the *ex post facto* clause prohibits the legislature from doing, because that violates the accused's right to due process. *United States v. Goodhiem*, 651 F.2d 1294, 1297 (9th Cir. 1981).

In *O'Callahan* and *Relford* this Court has confined the sweeping language of the Uniform Code of Military Justice within Constitutional limits. Here, however, the Court of Military Appeals has relaxed the constitutional limits on the reach of the Uniform Code of Military Justice, and in particular Articles 80, 128 and 134, 10 U.S.C. §§ 880, 928 and 934, as they relate to off-base sex offenses against civilian dependents. This decision is

contrary to the Court of Military Appeals' own precedents which held that conduct like that involved here was beyond the reach of the Uniform Code of Military Justice. *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969). This violates the petitioner's due process rights, not because he was not on notice that his acts might be crimes in the abstract or under state law, but because it makes a federal crime out of conduct that was not a federal crime at the time the acts were committed, by retroactively expanding court-martial jurisdiction. *See Woxberg v. United States*, 329 F.2d 293 (9th Cir. 1964); *United States v. Juvenile*, 599 F. Supp. 1126 (D. OR 1984). This is important because it disadvantages petitioner by depriving him of the greater constitutional protections of a trial in a civilian court and defeats his defense of lack of court-martial jurisdiction. The decision of the Court of Military Appeals has the effect of an *ex post facto* law, therefore, it violates petitioner's fifth amendment due process rights and should be reversed.

ARGUMENT

I. THE COURT OF MILITARY APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH THIS COURT'S PRECEDENTS BY FINDING THAT THE VICTIM'S DEPENDENT STATUS ALONE IS SUFFICIENT TO SUPPORT COURT-MARTIAL JURISDICTION.

A. The Court Of Military Appeals Did Not Apply This Court's Service-connection Test, But An Incorrect Standard Which Is So Pliable It Is Meaningless.

The decision of the United States Court of Military Appeals should be reversed because it conflicts with this Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258

(1969), and *Relford v. Commandant*, 401 U.S. 355 (1971). The Court of Military Appeals' decision expands court-martial subject-matter jurisdiction beyond the constitutional limits spelled out in *O'Callahan* and *Relford*.

The Court of Military Appeals' decision does not address the *Relford* factors and considerations, or the fact that the trial judge considered all of them and did not find a single one that supported service-connection. Instead, the decision relies principally on a holding that, as a matter of law, the effect of the dismissed offenses on the fathers of the alleged victims caused an impact on the Coast Guard sufficient to support subject-matter jurisdiction. This holding bases jurisdiction solely on the dependent status of the victims and is inconsistent with the trial judge's finding of fact that the impact of the dismissed offenses on the fathers of the alleged victims had only a remote and indirect impact on the Coast Guard. *See supra* note 7.

In this case, the Court of Military Appeals has obviously employed its flexible subject-matter jurisdiction analysis;[8] an analysis that is not bound by the result that application of the *Relford* factors and considerations requires, and that does not set any limits on other criteria that may be considered. This analysis renders the service-connection test so pliable it is meaningless and its provides servicemembers no protection of their right to a civilian trial for civilian offenses.

The Court of Military Appeals' decision does not give proper consideration to the interests of servicemembers. It suggests that any asserted impact upon the military, regardless of how remote or indirect, will be sufficient to outweigh the servicemember's interest in the greater

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[8] The United States Court of Military Appeals began its departure from what it termed a "slavish" application of the *Relford* criteria in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). It has continued this trend in its decisions in *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Johnson*, 17 M.J. 73 (C.M.A. 1983); and in the instant case.

constitutional protections of a civilian trial. The Court of Military Appeals seems to have embraced the position of one writer who has suggested that the imagination of the government is the only limitation on court-martial subject-matter jurisdiction.[9]

The Court of Military Appeals, in this decision and in others,[10] gives military courts a completely free hand to find service-connection on the basis of any single factor or combination of factors, tangible or intangible, proven or presumed. While rejecting the *Relford* factors and considerations as too inflexible, the Court of Military Appeals has not placed any limitations on other factors that can support subject-matter jurisdiction. The Court of Military Appeals' decision, at the very least, sets the law of service-connection back to the time, after *O'Callahan* but before the *Relford* decision, when one Justice predicted that the "infinite permutations of possibly relevant factors" [11] would create confusion about the limits of subject-matter jurisdiction.

Prior to the *Relford* decision, it was those who favored expansive military jurisdiction that seemed most concerned about the unlimited factors that could be considered in deciding whether or not an offense was service-connected. They were concerned that military interests would not receive proper consideration. Now it is the servicemember who is concerned that his individual interests are not being protected.

The Court of Military Appeals is not only creating confusion in this area of the law, it is using its flexible service-connection test, case by case, to eviscerate the *O'Callahan* and *Relford* decisions. In *United States v.*

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[9] Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F.L.Rev. 1 (1985).

[10] *See supra* note 8.

[11] *O'Callahan v. Parker*, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting).

Trottier, 9 M.J. 337 (C.M.A. 1980), the Court of Military Appeals extended military subject-matter jurisdiction to all drug offenses. In this case it has extended military subject-matter jurisdiction to all sex offenses against dependents. In one of its latest subject-matter jurisdiction cases, the Court of Military Appeals has indicated that it may be willing to accept the position that all offenses committed by officers are service-connected. *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

The Coast Guard Court of Military Review's decision in this case is a perfect example of how ready military courts are to exercise and expand the freedom the Court of Military Appeals has given them, to find jurisdiction based on the flimsiest claim of military interest. That decision bases subject-matter jurisdiction primarily on the potential impact of the Alaska offenses on petitioner's military neighbors at Governors Island. The impact was inferred entirely from the nature of the alleged offenses, even though the offenses allegedly occurred many months before they were disclosed and thousands of miles from Governors Island. Although the Government had the burden of proving jurisdiction by a preponderance of the evidence, *see* Rules 905(c)(1), and 905(c)(2)(B), R.C.M., MCM 1984, the Coast Guard Court inferred the potential impact without any proof of actual impact on Governors Island.

As this obviously suggests, the Court of Military Appeals' flexible analysis permits military courts to broadly infer impact from the nature of the offense. As a result, an offense may be found to be service-connected *per se*, in violation of this Court's requirement for a fact based determination of service-connection. *See Relford v. Commandant*, 401 U.S. 355, 365-366 (1971). The Court of Military Appeals' decision, in this case, certainly implies that every sex offense committed by a servicemember against a child dependent is *per se* service-connected. *United States v. Solorio*, 21 M.J. 251, 256 (C.M.A. 1986).

Any offense committed by a servicemember has some impact on the service, at the very least, the military is deprived of the members services while he is prosecuted and serving his sentence, and it casts the military in a bad light when his uniformed status is exposed. However, to allow such impact, by itself, to support subject-matter jurisdiction is tantamount to substituting a status test for the service-connection test.

Moreover, the Court of Military Appeals' decision cannot be limited to child sexual abuse cases, because the psychological effect on the victim and the victim's family, and the impact on the military, will be the same whenever any serious crime is committed by a servicemember against a military dependent. The psychological impact of a murder, or any other violent crime, on the victim's family and any resulting indirect impact on the military, will be just as severe as the impact from sexual abuse. Child sexual abuse is currently the subject of widespread public and media attention; in time that attention is likely to refocus on other tragic crimes. "Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies." *Hirshberg v. Cooke*, 336 U.S. 210, 214 (1949).

No previous case has held that the dependent status of a victim is sufficient to support subject-matter jurisdiction over an offense that has no significant and direct impact on the military. The dependent status of the victims was one of the factors supporting jurisdiction in *Relford*; but there were other significant factors, including the fact that the offenses were committed on a military post. In this case, however, the offenses occurred in the civilian community, at a place where there is no military post at which servicemembers and their families live. Furthermore, the offenses have never become public knowledge, even among servicemembers, at the place where they occurred.

B. The Court Of Military Appeals Has Failed To Justify Its Departure From This Court's Precedents And Its Own Precedents.

The Court of Military Appeals has erred in suggesting that developments in the military and in society since the *O'Callahan* and *Relford* decisions justify rejection of its own precedents which properly applied those decisions. *United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986). The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Relford* were decided.

Our society's increased concern for the victims of crime is no more reason to take the right to a civilian trial away from servicemembers than it is a reason for subjecting civilians to trial by court-martial. Any victim who felt that "a military trial is marked by the age-old manifest destiny of retributive justice" [12] might prefer a trial by court-martial. That does not, in any way, justify depriving an accused of constitutionally protected trial rights.

Increased concern for victims is not a singularly military phenomenon. State officials would have been equally interested in protecting the victims' rights, if this case had been tried in state court.[13] As the Court of Military Appeals has pointed out, Congress and state legislatures have made changes in civilian criminal systems to protect more fully the rights of victims. *United States v. Solorio*, 21 M.J. 251, 254-255 (C.M.A. 1986). Civilian courts, certainly, have not interpreted such changes as authority for the abridgment of constitutionally protected rights.

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[12] *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969).

[13] As the American Civil Liberties Union *Amicus Curiae* Brief in support of the petition for a writ of certiorari pointed out, Alaska has statutes protecting the rights of victims. Alas. Stat. §§ 12.55.022, 12.55.025, 12.61.010, and 33.15.065 (1984).

The Court of Military Appeals also erred in relying on the pendency of other military charges and the deferral of the civilian authorities to the military as major considerations supporting military jurisdiction. The *O'Callahan* and *Relford* decisions properly do not give such factors weight in the service-connection determination. These factors are too easily manipulated and too far removed from the real interests that should be balanced to provide well defined limits on court-martial jurisdiction.

The Government's major argument, in its Brief in Opposition, suggesting that the Court of Military Appeals' decision does not conflict with this Court's decisions or unconstitutionaly expand court-martial jurisdiction, is based on a false premise. It asserts, based on language from the decision of the Coast Guard Court of Military Review, that, where there is no military base or enclave, a unit commander has the same responsibility for the welfare of dependents living in the civilian community that a base commander has for dependents living on-base. Opp. at 13.

Building on that improbable assertion, it states "it is reasonable to treat offenses committed against Coast Guard servicemen and their dependents in Juneau as if they were committed on a military base", *id.*, even though there is no military base at Juneau and the offenses occurred in petitioner's home in the civilian community. The Government concludes that the decisions of the courts below are consistent with *Relford*, because it is "immaterial" that the offenses occurred off-base. *Id.* Having thus disposed of these issues to its satisfaction, the Government goes on to treat petitioner's arguments as if he were simply relying on past Court of Military Appeals decisions, rather than *O'Callahan* and *Relford*. *Id.* at 16-17.

There is no basis in fact or law for the assertion that the commander of a unit, at a place where there is no military base, has the same responsibility for the welfare

of dependents living in the civilian community as for dependents living on-base. Moreover, there is no basis in fact or law for the assertion that it is immaterial whether the offenses occurred off-base or on a military enclave. *O'Callahan*, and perhaps even more so *Relford*, make it clear that the situs of the offense is directly relevant to, and often determinative of, court-martial jurisdiction.

The only argument supporting these assertions that the Government can suggest is that a contrary result would unreasonably restrict a unit commander's ability to protect civilian dependents. Opp. at 13. This argument begs the question, however, because under this Court's decisions, civil authorities have primary responsibility for protecting civilian dependents unless the military can demonstrate some military interest in the case that outweighs the accused's interest in the constitutional protections he would receive in a civilian trial. The suggestion that a unit commander's interest in protecting civilian dependents against off-base crimes by servicemembers, *per se*, outweighs the accused's interest in a civilian trial, clearly conflicts with *O'Callahan* and *Relford.*

The Government also suggests without basis that the Court of Military Appeals, only now, has simply reconsidered in light of *Relford* which was decided fifteen years ago, its earlier decisions on off-base offenses against dependents. Opp. at 17-18. The Court of Military Appeals, however, states that its apparent abandonment of those decisions is based on what it perceives to be changed conditions. Pet. App. A, 9a. Moreover, the Court of Military Appeals has not just reconsidered its prior decisions in light of a consistent interpretation of *Relford*, as the Government implies. Opp. at 17-18. It has recently reconsidered its interpretation of *O'Callahan* and *Relford* so as to free itself to greatly expand court-martial jurisdiction beyond the constitutional limits set out in those cases.

The Government's claim that the *McGonigal*, *Shockley*, and *Henderson*[14] decisions turned on the connection between the offenses and the accused's duties, opp. at 17, rather than the situs of the offense, is most clearly belied by the *Shockley* case, which involved both on-base and off-base offenses. There, the on-base offenses were found to be service-connected and the off-base offenses were found not to be service-connected.

Apparently unwilling to meet petitioner's argument that there are no changed circumstances to justify the Court of Military Appeal's expansion of court-martial jurisdiction beyond the constitutional limits set out in *O'Callahan* and *Relford*, the Government resorts to the fiction that the Court below has merely reconsidered its prior decisions in light of *Relford*. This certainly is not a fair reading of the cases. By rejecting its own prior decisions which were consistent, and roughly contemporaneous, with this Court's decisions, the Court of Military Appeals has decided the instant case in a way that conflicts with *O'Callahan* and *Relford.*

The Government asserts that the Court of Military Appeals relied on the *Relford* factors to decide this case and that, therefore, the case does not present the question of whether the dependent status of the victim alone is sufficient to support court-martial jurisdiction. Opp. at 16. In fact, however, rather than balancing all of the *Relford* factors to determine whether the military interest in trying the case outweighed the petitioner's interest in a civilian trial, the Court of Military Appeals based its decision on just a few considerations which it found to favor military jurisdiction. The only impacts upon the military were indirect, and flowed from the dependent status of the victims. *Infra* pp. 23-36.

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[14] *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

The Government suggests, without citing any evidence or other support, that "[t]he military has an obvious and substantial interest in being able to bring criminal charges against a serviceman for sexually abusing military dependents." Opp. at 14. But the bare suggestion does not make it so.

The Government also suggests that crews at sea for long periods must feel secure about the safety of their families in order to carry out their responsibilities. Opp. at 14. However, there is no evidence that prosecution of offenders by civil authorities would make these crewmen uneasy, and there is no evidence that the servicemember fathers of the victims in this case were assigned to sea duty at the time of the offenses, or at any time since. In any event, such considerations alone cannot properly support court-martial jurisdiction.

The Court of Military Appeals' decision should be reversed because it employed an incorrect standard to find that there was subject-matter jurisdiction. That flexible standard not only conflicts with the *O'Callahan* and *Relford* decisions, it is so pliable that it renders the service-connection test, which is at the heart of those decisions, meaningless. If this Court does not decide the question of military subject-matter jurisdiction, here, by a detailed and thorough balancing of the *Relford* factors and considerations, it will encourage military commanders and the military courts to continue to expand jurisdiction, in every significant case, by employing the "infinite permutations of possibly relevant factors" [15] to support military jurisdiction.

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[15] *O'Callahan v. Parker*, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting).

II. THE FACTS OF THIS CASE CANNOT SUPPORT COURT-MARTIAL JURISDICTION BECAUSE THEY DO NOT DEMONSTRATE A MILITARY INTEREST THAT OUTWEIGHS THE ACCUSED'S INTEREST IN A CIVILIAN TRIAL.

A. The Trial Judge Properly Found That The Facts Of This Case Do Not Support Court-Martial Jurisdiction.

Another reason for reversing the Court of Military Appeals' decision is that the facts of this case cannot support subject-matter jurisdiction. Petitioner submits that the trial judge was correct in finding that the Coast Guard lacked subject-matter jurisdiction over the charges and specifications he dismissed.

The trial judge's findings of fact are supported by the record; those findings are not clearly erroneous or untenable. The trial judge considered and properly applied all applicable law; he did not abuse his discretion. The burden of persuasion on factual issues related to a motion to dismiss for lack of jurisdiction is on the Government. Rule 905(c)(2)(B), R.C.M., MCM 1984. The burden of proof on any factual issue necessary to decide the motion is also on the Government, by a preponderance of the evidence. Rule 905(c)(1), R.C.M., MCM 1984.

In this case, the two most significant facts bearing on the issue of service-connection are, that there is no Coast Guard base or enclave, in the usual sense of those words, at Juneau, Alaska, and that the allegations against appellant were not made until long after all of the parties to the offenses had left Juneau, so that the allegations have not become public knowledge there. These facts, and the inferences and conclusions that can be drawn from them, underlie many of the trial judge's findings. Because of these facts the impact of the Alaska offenses on the Coast Guard was remote and indirect.

The trial judge did not base his decision strictly on the twelve *Relford* factors and the nine additional *Relford*

considerations. Following this Court's language in *Schlesinger v. Councilman*, 420 U.S. 738 (1975),[16] he also focused on whether the military interest in prosecuting these offenses was different from, and greater than, that of civilian courts. The trial judge, nevertheless, found that the Government had failed to meet its burden of proving jurisdiction.[17] J.A. 196.

Because of other recent departures by the Court of Military Appeals from this Court's precedents, *see supra* note 8, the trial judge explicitly stated that he recognized "a continuing evolution of the concept of subject-matter jurisdiction . . . ." J.A. 196. But even taking that into account, he concluded that the facts of this case do not support a finding of service-connection.

B. Application Of The Twelve *Relford* Factors And Nine Additional *Relford* Considerations To The Facts Of This Case Make It Clear That The Facts Cannot Support Court-Martial Jurisdiction.

None of the twelve *Relford* factors[18] supports court-

[16] "[The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." *Id.* at 760.

[17] The trial judge stated, "I find that the Coast Guard interest in deterring these offenses is not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts. J.A. 200.

[18] Those factors are:

1. The serviceman's proper absence from the base.
2. The crimes commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

martial subject-matter jurisdiction in this case. Moreover, none of the nine additional *Relford* considerations[19] supports court-martial subject-matter jurisdiction.

6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offenses being among those traditionally prosecuted in civilian courts.

Relford v. Commandant, 401 U.S. 355, 365 (1971).

[19] Those considerations are:

a. The essential and obvious interest of the military in the security of persons and of property on the military enclave;

b. The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order;

c. The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operation and the military mission;

d. Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that person over to the civil authorities;

e. The distinct possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community;

f. The presence of factors such as geographical and military relationships which have important significance in favor of service-connection;

g. Historically, a crime against the person of one associated with the post was subject even to the General Article;

h. The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law;

There was no evidence that any of the offenses occurred at a time when petitioner was not properly absent from his unit on leave or liberty. The offenses were committed in petitioner's home in the civilian community of Juneau, Alaska. Petitioner's home in the civilian community is not a place under military control, and Juneau is within the territorial limits of the United States.[20]

There was no evidence that petitioner was on-duty when the offenses were committed, that he formed the intent to commit these offenses while on-duty, or that he had a continuing intent to commit these offenses which extended to on-duty hours. Captain Caprio could not testify that petitioner was a pedophile or had any continuing attraction to young girls, much less that he formed the intent to commit these offenses while on-duty. J.A. 142.

The offenses were committed in peacetime, and are unrelated to the war powers because they do not pose a threat to the reliability and efficiency of the armed forces.[21] Despite the Government's attempts to show some evidence to the contrary, these offenses had only a remote and indirect impact on the Coast Guard. There is no evidence that offenses like those committed here are so rampant in the armed forces or have such disastrous effects on the health, morale and fitness for duty of

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i. The inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a servicemember's duty and off-duty activities and hours on the post.

Relford v. Commandant, 401 U.S. 355, 367-369 (1971).

[20] The trial judge correctly found that: "the accused was properly absent from his unit at the time of each of the alleged offenses"; "[e]ach offense was alleged to have occurred away from any military base at the accused's residence in the civilian community"; "[e]ach offense was alleged to have occurred in a place not under military control"; and "[e]ach offense was alleged to have occurred within the territorial limits of the United States." J.A. 196.

[21] The trial judge's correctly found that: "all offenses were unrelated to authority stemming from the war power." J.A. 196.

servicemembers that they can be said to pose a significant threat to the reliability and efficiency of the armed forces.

There was no connection between petitioner's military duties and the offenses.[22] Other family and neighborly relationships were more significant factors in enabling petitioner to commit the alleged offenses than his status as a member of the Coast Guard.[23]

The victims are not servicemembers and they were not engaged in any duty related to the military when the offenses occurred.[24] They visited petitioner's home for personal social purposes. J.A. 48-49, 52 and 53-54.

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[22] The trial judge correctly found that petitioner: "did not use his military position to commit any of the offenses, nor did he commit any of the alleged offenses while performing his military duties." J.A. 196.

[23] The trial judge correctly found that: "[t]here was a *de minimus* [sic] military relationship between the accused and the military fathers of the victims." J.A. 198. This finding is explained by his further finding, regarding the fathers' relationships to petitioner, that "[t]hose relationships were founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships." *Id.* The trial judge found that the military relationship between petitioner and the victims' fathers was slight compared to other factors that fostered the families' relationships. He also correctly found that any abuse of trust arising from petitioner's status as a member of the Coast Guard was minimal and had no direct relationship to the offenses, because any trust bearing on the opportunity to commit these offenses arose from friendships between the families. Supplemental Essential Findings of Fact, Pet. App. F, 62a.

[24] The trial judge correctly found that: "[t]he victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses." J.A. 196.

Alaska state courts are present and available to prosecute these offenses.[25] The Assistant District Attorney's deferral of prosecution is clearly conditional, it states "that at this time, subject to future evaluation or developments" the State of Alaska will defer prosecution. Opp. at 1a. It does not waive or decline prosecution. In any event, the Court of Military Appeals properly found that the Alaska prosecutor's letter was not entitled to much weight. Pet. App. A, 13a. That Court had the prescience to suspect that an aggressive military prosecutor might seek to persuade civil authorities to defer prosecution, in a case they otherwise would prosecute, to create court-martial jurisdiction. *Id.* Moreover, if there can be any remaining doubt about the availability of the Alaska courts it should be dispelled by the stipulation of expected testimony of Louis Menendez, the Alaska Assistant District Attorney, which states "[s]hould the Coast Guard determine, however, that the court-martial is without jurisdiction to prosecute this case, the District Attorney's office would reconsider is decision not to prosecute." J.A. 67.

There was no evidence that these offenses involved any flouting of military authority, posed a threat to any military installation, or involved any violation of military property.[26] In fact, there is no Coast Guard base or enclave, in the usual sense of those terms, in Juneau. Pet. App. B, note 1 to 20a.

The offenses committed here, involving sexual abuse of minors, are of the type traditionally prosecuted in

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[25] The trial judge correctly found that: "[c]ivilian courts are present and available to adjudicate the offenses." J.A. 196.

[26] The trial judge correctly found that: "[a]ccused was not in uniform and in no way flouted military authority at the time of the alleged offenses"; "[n]one of the alleged offenses posed a threat to any military installation"; and "[n]one of the offenses resulted in any violation of military property." J.A. 196.

civilian courts.[27] It is clear from Appellate Exhibit X, J.A. 65, a message describing the results of the prosecution of two members of the Coast Guard, that the State of Alaska had actually prosecuted, and convicted, service-members for sexual abuse of minors. One of those convictions was so recent, at the time Appellee Exhibit X was prepared, that sentencing of the individual was still pending. J.A. 65.

The offenses did not implicate the military's interest in the security of persons or property on a military enclave, or the responsibility and authority of a military commander to maintain order within his command.[28] There was no threat of confrontation, between petitioner and the victims' fathers while they were assigned to the same unit, that would have an impact on the unit commander's responsibility for maintaining order. There was evidence that the fathers of the alleged victims were assigned to the same unit as petitioner, the Seventeenth District Office, at the time the offenses were committed, and evidence they became upset and angry when they learned of the allegations. However, the victims' fathers were not aware of the allegations while they were stationed with petitioner.

Chief Warrant Officer [CWO] Johnson was assigned to Coast Guard Headquarters in Washington, D.C., and Yeoman Second Class [YN2] Grantz was stationed at a unit in Baltimore, Maryland, when they learned of the allegations. J.A. 49, 107, and 123. Petitioner, meanwhile, had been transferred to a unit on Governors Island, New York. Because all of the parties were transferred before

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[27] The trial judge correctly found that: "the alleged offenses are of the type traditionally prosecuted in civilian courts . . . ." J.A. 197.

[28] The trial judge properly found that: "[t]here is no essential interest of the military in the security of person or property on post in this case"; and "[n]o issue challenges the Commander's responsibility and authority to maintain order." J.A. 197.

any allegations were made, there was no impact from these offenses on the Seventeenth District Office. Petitioner's, and the victims' fathers', ability to perform their duties at the Seventeenth District Office was not affected.

The Alaska offenses did not have an impact on the Coast Guard community at Juneau.[29] There also was no impact from these offenses at the Coast Guard Base at Governors Island.[30] The offenses which petitioner com-

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[29] TTC Truby testified as follows:

Q. Do you keep contact with anyone in Juneau?

A. Yes my wife does, we have friends that live there, I don't keep contact with them directly.

Q. Through contacts with your wife are you aware of any effect on the reputation, morale, military discipline of the command in Juneau?

A. No nothing was mentioned that I know of.

J.A. 89. CWO DeMarchi, another witness testified as follows:

Q. You correspond regularly with people in Juneau?

A. Yes sir, I do.

Q. Are you aware of any impact that these allegations made against Petty Officer Solorio have had on the Juneau community?

A. No sir, I am not.

J.A. 100.

The trial judge properly found that: "[t]here has been no demonstrated impact of the offenses on morale, discipline, the reputation or integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions." J.A. 197.

[30] The only direct evidence on the issue was the testimony of TTC Truby, and he testified as follows:

Q. You stated that you live on Governors Island in the BEQ?

A. Yes Barracks 513 sir.

Q. Prior to discussing this case with Mr. Couper [the Coast Guard prosecutor] and myself, had you heard anything about the allegations of child sexual abuse?

A. No sir, only that—like I said when I ran into Frank [Grantz, the father of one of the victims] I asked him what

mitted on Governors Island, which are not at issue here, are far more likely to have been responsible for any impact on Governors Island than the offenses committed thousands of miles away in Alaska, months before petitioner arrived on Governors Island.

The Alaska courts did not have a lessened interest, concern and capacity to vindicate the military disciplinary authority within its own community.[31] In fact, there really is no distinct Coast Guard community in Juneau. The Coast Guard personnel all live in, and are a part of, the civilian community. J.A. 48.

Moreover, although the issue of the interest of the Alaska courts in these offenses was contested, and there is some conflicting evidence, the facts support the conclusion that the Alaska courts did not have a lessened interest in these offenses. S/A Gary Smith testified that, even though petitioner and his victims had been transferred, the State of Alaska was continuing to investigate possible sexual child abuse offenses against the children of civilians in Juneau. J.A. 149. He testified that the State of Alaska was following up on a lead involving a child, apparently still in Alaska. J.A. 150. There was also evidence of the State's recent prosecution of members of the Coast Guard for similar offenses. *Supra*

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was he doing here and he said it was an Article 32 hearing, I asked him what for and he got very teary eyed and I stopped.

Q. So until you had contact with people involved with this case you were aware of no effect on morale on Governors Island were you?

A. Impact from this case on morale on Governors Island?

Q. That's correct.

A. No sir, I was not aware of any allegations of any sort until then.

J.A. 89.

[31] The trial judge correctly found that: "[t]here has been no evidence suggesting a potential lessened interest concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses." J.A. 197.

p. 29. The absence of the offender and the victims from the state may make prosecution somewhat more difficult, but it is not an insurmountable obstacle and it is one that prosecutors routinely face.[32]

The offenses did not injure relationships between the military and civilian community.[33] As has just been noted, *supra* p. 31, there is no distinct Coast Guard community in Juneau, and these offenses have not become public knowledge in Juneau.

Because there is no military base or enclave in Juneau, the victims here cannot be considered to be persons associated with the post. Moreover, as has been discussed above, *supra* p. 17, the dependent status of a victim alone has never been held to be sufficient to support court-martial jurisdiction. Finally, since the offenses did not occur on a military base, this case does not involve trying to draw a line between a posts military and nonmilitary areas.[34]

The facts of this case do not supply a basis for subject-matter jurisdiction. Therefore, this is not an appropriate case for the military to exercise more than its power to turn the petitioner over to the civil authorities. Petitioner has relied on the absence of facts to support court-martial jurisdiction, and not on a misreading of *O'Callahan* that would restrict courts-martial to purely military offenses. When a proper service-connection analysis is made, utilizing the *Relford* factors and considerations, it is clear that the Court of Miliary Appeals erred in holding that there was court-martial subject-matter jurisdiction in this case.

[32] The Coast Guard Military Justice Manual, COMDTINST M5810.1A, Chapter 800, contains procedures for the delivery of Coast Guard personnel to civil authorities, including the situation where the servicemember is beyond the territorial limits of the requesting state.

[33] The trial judge correctly found that: "[t]here is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles"; and "[n]o adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents." J.A. 198.

[34] The trial judge correctly found that: "we do not have a case of inability to distinguish between the military from non-military area of a post or between the accused's on duty versus off-duty time while on post." J.A. 197.

C. No Military Interest Has Been Demonstrated That Outweighs Petitioner's Interest In A Civilian Trial.

Petitioner submits that this Court's precedents require an *ad hoc* determination of service-connection based on the facts of each case and application of the *Relford* factors and considerations. But even if it were permissible to ignore the *Relford* criteria where the Government proves a distinct military interest in the offenses that cannot be adequately vindicated in civilian courts, the Government has failed to prove that here.

The trial judge gave appropriate consideration to the Government's arguments asserting factors that are not relevant or significant to service-connection, under *O'Callahan* and *Relford*. These arguments failed to persuade him that the Government had demonstrated a military interest that was greater than that of the civilian courts, or that could not be adequately vindicated in the civilian courts.

The impact of these offenses on the victims and their families would have been the same if the offender had been a civilian.[35] This shows that the impact was not of the type to create a distinct military interest in prosecuting these offenses. If the impact on the victims and their families had been proven to be significantly different because the offender was in the Coast Guard, or if the impact could only have been produced by someone in the Coast Guard, there might have been grounds for finding

[35] The trial judge correctly found that the impact of these offenses was "no different than that which would have been produced by [a] civilian perpetrator." J.A. 197.

that there was a distinct military interest in prosecuting these offenses, even though the impact on the service was remote and indirect. However, since the impact on the victims and their families would have been the same if the offender had been a civilian, there was no distinct military interest, and the civilian courts could adequately vindicate any military interest. *See supra* note 17.

The Coast Guard Family Advocacy Program specifically excludes child abuse situations like those in this case from its scope. J.A. 56. Inferences can be drawn, however, from the Program's treatment of intra-family child abuse that show that there was no distinct military interest in these offenses, and that any military interest could be adequately vindicated in civilian courts.

In the intra-family child abuse situations, which are within the scope of the Family Advocacy Program, the Coast Guard has specified that local law should govern and, therefore, set the standards for behavior. J.A. 58. The Family Advocacy Program includes a policy of relinquishing federal jurisdiction so that local child abuse law would apply on Coast Guard installations. *Id.* The Coast Guard's reliance on local law in these instances supports the conclusion that the Coast Guard's interest in child sexual abuse situations is not distinct from that of civil authorities, and that the Coast Guard's interest can be adequately vindicated in civil courts.

There was no impact on the unrestricted transfer of personnel, and in fact, all involved parties have been transferred without restriction. Captain Caprio testified that if a servicemember was transferred to a place where there were no Coast Guard facilities available to provide counseling for a dependent victim of sexual abuse, there would more than likely be facilities in the community. J.A. 141. CWO Johnson testified that his family was receiving counseling from a civilian organization, State of Virginia Family Counseling. J.A. 108. He also testified that the counseling program "could take as much as a year or more." J.A. 112. YN2 Grantz testified that his family was receiving counseling from the Sex Crisis

Abuse Center in Annapolis, Maryland, an Anne Arundel County program. J.A. 124. He testified that the counselor estimated that counseling might last six months to a year. J.A. 125.

Since, both the Johnson and Grantz families are currently being counseled in civilian rather than Coast Guard facilities, and such facilities are likely to be available in any community to which they may be transferred, there is no impact on their availability for unrestricted transfer. Furthermore, CWO Johnson was transferred in 1983, J.A. 102, and YN2 Grantz was transferred in 1984, J.A. 120. Even if the counseling were to take two years rather than the one year that was estimated in both cases, the Johnson and Grantz families will have completed their counseling before they have completed a normal four year tour of duty at their current duty stations.

Cases suggesting that assignment to the same unit is a significant factor in determining impact on the service can be distinguished on their facts from this case, and certainly, no prior case has held that this factor alone is sufficient to establish service-connection. For example, in *United States v. White*, 1 M.J. 1048 (NC.M.R. 1976), the "dependent" wife and victim, was in the Navy, as was her husband and the accused. The accused was not only a member of the victim's husband's unit, but was in the same duty section. Moreover, the accused first met and accosted the victim on base, he formed the the intent to commit a crime against the victim on base, and the accused was able to learn that the victim's husband would not be home at the time he sexually assulted her because of his military status and duty assignment.

There were many factors in *White* that led the court to find that the military relationships were significant. It would be a great oversimplification of the analysis there to suggest that membership in the same unit, by itself, is a significant factor.

It would be incorrect to argue that where there has been a failure to prove any actual effect on morale and discipline, a decline in morale or damage to service reputation can be found to be a natural consequence of certain offenses. Inferences based solely on the nature of the offense cannot support service-connection if the test is to continue to be based on the facts of each case rather than *per se* rules. Moreover, if such an inference can be justified in some cases, this is not such a case.

The victims in this case were not servicemembers, and there are no other facts in this case sufficient to support service-connection. There is only evidence that these alleged offenses have had an effect on the victims' fathers, who are servicemembers. The Coast Guard has attempted to bootstrap this single factor into grounds for finding service-connection by asserting every imaginable impact stemming from the effect of these offenses on the victims and their fathers. In fact, however, there has been only a remote and indirect impact on the Coast Guard, and any military interest in these offenses could be adequately vindicated in the civilian courts.

The record shows that the facts of this case fail to demonstrate a military interest that outweighs the accused's interest in a civilian trial. Therefore, the decision of the Court of Military Appeals should be reversed because the facts cannot support its finding that the offenses are service-connected.

III. THIS COURT SHOULD NOT HESITATE TO ENFORCE ITS PRECEDENTS WHICH PROPERLY LIMIT COURT-MARTIAL JURISDICTION.

A. Service-connection Has Evolved Into A Well-defined Principle Of Law.

The most serious criticism of the *O'Callahan* decision came immediately after the case was decided, and suggested that the case would lead to confusion and uncertainty about the limits of military subject-matter

jurisdiction. Justice Harlan, dissenting in *O'Callhan*, stated:

> the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible. . . . Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance.

Id. at 284. He concluded, "the Court has thrown the law in this realm into a demoralizing state of uncertainty." *Id.* at 275.

In *Relford*, this Court acknowledged that the *O'Callahan* decision had met with some generally critical comments including those of, then, Professor Everett. *Id.* at 357. The Court noted that the criticism expressed concern, as had Justice Harlan's dissent, about the confusion that *O'Callahan* might cause.[36] *Id.* Therefore, in *Relford* this Court clearly set out its analysis of the service-connection issue, and that analysis has served as a model which has been followed by lower courts for more than fifteen years. That service-connection analysis has eliminated the potential for confusion in this area of the law by limiting the "infinite permutations of possibly relevant factors" to the twelve "*Relford* factors" and nine additional considerations.

By Executive Order, the law of *O'Callahan* and *Relford*, has been incorporated into the regulations that govern courts-martial. Rule 201(b), R.C.M., MCM 1984, states that courts-martial only have jurisdiction over offenses that are subject to court-martial jurisdiction. *Supra* p.

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[36] Chief Judge Everett wrote in his article, *O'Callahan v. Parker —Milestone or Millstone in Military Justice*, 1969 Duke L.J. 853, "[c]riticism of the majority opinion would be more muted if it had given a clearer test for deciding when military jurisdiction exists." *Id.* at 869.

2. Rule 203, R.C.M., MCM 1984, makes any offense under the Uniform Code of Military Justice subject to court-martial jurisdiction, to the extent permitted by the Constitution. *Id.* The Discussion and Analysis of Rule 203 were published by the Department of Defense in conjunction with the Department of Transportation. They are nonbinding, but they are entitled to great deference and weight because they set forth the drafters' views of the state of the law of subject-matter jurisdiction.

The Discussion distills the law of service-connection into five types of offenses where the balance of *Relford* factors and considerations supports service-connection, and two exceptions where subject-matter jurisdiction will be found without applying the service-connection test. Pet. App. C and D, 46a-54a. Offenses that do not fit into the five types or the two exceptions are not service-connected.

The exceptions are for offenses committed overseas and petty offenses. Pet. App. C, 47a-48a. The five types of service-connected offenses are: "military offenses"; "offenses on a military installation"; "drug offenses"; "offenses involving military status and the flouting of military authority"; and, offenses committed in time of war. *Id.* at 46a-47a.

The Discussion of Rule 203 shows that when MCM 1984 was published in July 1984, service-connection had evolved into a principle of law that was well-defined by the simple guidelines described there. Consistent application of this Court's service-connection test provided a high degree of certainty as to the limits of court-martial subject-matter jurisdiction. Military prosecutors and accuseds, alike, could predict quite accurately which offenses were service-connected and which were not.

There was little use to the accused in litigating subject-matter jurisdiction over cases involving offenses committed overseas, petty offenses, military offenses, offenses occurring on-base and offenses committed in time of war.

Similarly, there was little use in trying to court-martial a servicemember for an off-base offense unless it involved drugs, use of military status to commit the offense, flouting of military authority, or unless the offense was directly related to significant on-base conduct or impacts.

As the discussion of the facts of this case, *supra* pp. 23-36, shows, the offenses which were dismissed by the trial judge here do not fit into any of the types of service-connected offenses. There is no hint in either the Discussion or the Analysis of Rule 203 that the dependent status of a victim is, by itself, sufficient to establish service-connection. *See* Pet. App. C and D, 43a-54a. Therefore, the Court of Military Appeals' decision, not only fails to follow this Court's decisions in *O'Callahan* and *Relford*, it conflicts with the settled law of subject-matter jurisdiction.

B. This Court's Precedents Strike The Correct Balance Between The Servicemember's Interest In A Civilian Trial And The Military Interest In Discipline.

The right to a civilian trial for a civilian offense is an important right for a military accused. On the other hand, there is a legitimate need for discipline in the military. This Court has struck the proper balance between the servicemember's interest in a civilian trial and the military's interest in discipline. The servicemember's right to a civilian trial is protected, but it is limited, so it does not interfere with the legitimate need for discipline in the military which the service-connection test, set out by this Court in *O'Callahan* and *Relford v. Commandant*, 401 U.S. 355 (1971), fully protects. More than fifteen years after *O'Callahan* was decided military morale and discipline are as high as they have ever been.

This Court observed in *O'Callahan* and *Relford* that Article I, § 8, cl.14 and the Fifth Amendment allow Congress to create military courts which need not provide all the procedural safeguards essential to an Article III

court. On the other hand, the Court found that for offenses not subject to Congress' authority over national defense and military affairs, Article III, § 2, cl.3, the Sixth Amendment, and possibly the Fifth Amendment, guaranty the right to trial in a civilian court. In *O'Callahan* this Court held that offenses that are not service-connected are not within Congress' authority over national defense and military affairs, or at least that it is constitutionally inappropriate for Congress to exercise that authority over such offenses. *Id.* at 272-273. Therefore, such offenses cannot be proscribed by the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.*, or tried by court-martial. *O'Callahan*, 395 U.S. at 262.

O'Callahan and *Relford* were properly decided because there has been no appreciable cost in terms of military discipline for the servicemember's right to a civilian trial for civilian offenses. This Court has clearly stated that it intends the service-connection test to balance the constitutional rights of servicemembers against the military's interest in trying the case at a court-martial. While acknowledging that the special needs of the military justify a separate military justice system, the Court recognized that "expansion of military discipline beyond its proper domain carries with it a threat to liberty." *O'Callahan v. Parker*, 395 U.S. 258, 265. Moreover, the Court observed "the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to '*the least possible power adequate to the end proposed.*'" *Id.* (citing *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

C. It Is Proper For This Court To Exercise The Jurisdiction Congress Has Recently Given It Over The Court Of Military Appeals.

In its most recent decision involving servicemembers and their relations with their military commanders, *Goldman v. Weinberger*, —— U.S. ——, 106 S.Ct. 1310 (1986), this Court has deferred to the services' assertions

of military necessity and declined to probingly test the military's judgment concerning the relative importance of the military's interest in uniformity as compared to the servicemember's free exercise right. That deference is based on this Court's inability to predict the impact that any new limitation on military authority may have upon discipline, and respect for Congress' and the President's authority over national defense and military affairs. *Goldman*, at 1313.

Proper decision of this case, however, does not require any new limitations on military authority, neither does this Court have to speculate about the impact of its decision on military discipline. The limits on court-martial subject-matter jurisdiction were set out more than fifteen years ago in the *O'Callahan* and *Relford* decisions, and as has been pointed out earlier, those decisions have not had an appreciable cost in terms of military discipline. *Supra* pp. 39-40.

Moreover, in *O'Callahan*, this Court found that prosecution of offenses that are not service-connected is beyond the scope of Congress' authority over national defense and military affairs, or is at least a constitutionally inappropriate use of that authority. Any remaining doubts about the propriety of this Court's subjecting the decision below to rigorous appellate review must give way to the recent judgment of Congress in extending this Court's jurisdiction, for the first time, to cases on appeal from the Court of Military Appeals. *See* Military Justice Act of 1983, Pub.L.No. 98-209, § 10, 97 Stat. 1393, 1405 (1983).

This Court's precedents clearly require the military to support its assertions of subject-matter jurisdiction with something more than its views, perceptions or professional judgments of what offenses should be prosecuted by court-martial to promote military discipline. Therefore, the standard of review here is clearly different from the standard which was applied in *Goldman*. The higher standard which the military must meet before it can con-

vict and punish a servicemember at a court-martial, should not be confused with the lesser standard that this Court has held will support administrative actions which burden the servicemember's free exercise rights. This Court should not hesitate at all to enforce its decisions in *O'Callahan* and *Relford*.

IV. THE COURT OF MILITARY APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT DEPRIVES PETITIONER OF DUE PROCESS BY DEPARTING FROM ITS PRECEDENTS TO EXPAND COURT-MARTIAL JURISDICTION AND APPLYING THAT MORE EXPANSIVE INTERPRETATION TO PETITIONER IN THE SAME CASE.

The Court of Military Appeals' decision should be reversed because it departs from its own precedents and applies a more expansive subject-matter jurisdiction test to petitioner. Application to petitioner, in the same case, of this interpretation which expands the reach of the Uniform Code of Military Justice, violates Fifth Amendment due process. *Marks v. United States*, 430 U.S. 188 (1977); *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

In *Marks*, this Court held that the application of a decision expanding the constitutional reach of a statute, that proscribed conduct in sweeping language, to conduct that occurred before the decision was improper. In that case, the constitutional limits on statutes proscribing obscenity were relaxed in a decision rendered after the defendants had allegedly transported obscene material in interstate commerce. The application of the more expansive standard for obscenity to the defendants there was held to violate the Due Process Clause because it would have the same effect as an *ex post facto* law.

Here, the Court of Military Appeals has relaxed the constitutional limits on the reach of the Uniform Code of Military Justice, and in particular Articles 80, 128 and 134, 10 U.S.C. §§ 880, 928 and 934, as they relate to off-base sex offenses against civilian dependents. Those

statutes proscribe conduct of servicemembers in sweeping language that this Court has confined within constitutional limits in *O'Callahan* and *Relford*. This decision is contrary to the Court of Military Appeals' own precedents which held that conduct like that involved here was beyond the reach of the Uniform Code of Military Justice. *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

The Court of Military Appeals, however, did not even address the due process issue in this case The Court merely stated that:

> Admittedly, our precedents involving off-base sex offenses against civilian dependents of military personnel would point to a different conclusion. *See*, e.g., *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), which concerned drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience. [Footnote omitted].

United States v. Solorio, 21 M.J. 251, 254 (C.M.A. 1986).

The comment in a case concerning drug activity that "some" earlier opinions on service-connection need to be reexamined certainly cannot have satisfied the petitioner's right to fair warning about the reach of military statutes proscribing sex offenses. For one thing, the most significant rationale for the *Trottier* decision was that, because of their impact on military readiness, "it is necessary and proper in today's world that court-martial jurisdiction over most drug offenses be invoked as a proper exercise of the war powers." *United States v. Trottier*, 9 M.J. 337, 352 (C.M.A. 1980). There has been

no suggestion that off-base sex offenses similarly affect military readiness or are otherwise related to authority stemming from the war power. *See supra* pp. 26-27.

Moreover, the expansion of the reach of the Uniform Code of Military Justice to these offenses deprives petitioner of constitutional trial rights that even Congress could not retroactively strip from him. Such a law would be an *ex post facto* law. If Congress cannot pass such a law, the Court of Military Appeals cannot achieve the same result by judicial construction. *Bouie v. City of Columbia*, 378 U.S. 347, 353-354 (1964). Of course, Congress has not attempted to legislatively expand military jurisdiction over off-base sex offenses, even prospectively.

The Government argues in its Brief in Opposition that petitioner was not deprived of due process, asserting that there is no due process problem so long as petitioner was aware that his conduct was criminal. Opp. at 19. The issue, however, is not whether petitioner was on notice that his conduct was criminal in the abstract or under state law, but whether he was no notice that a court-martial had jurisdiction to try the offense. Congress cannot "make a federal crime out of acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law." *Woxberg v. United States*, 329 F.2d 284, 293 (9th Cir. 1964). *Bouie* and *Marks* have held that a court cannot, by reinterpreting the law, do in effect what the *ex post facto* clause prohibits the legislature from doing, because that violates the accused's right to due process. *United States v. Goodhiem*, 561 F.2d 1294, 1297 (9th Cir. 1981).

While conduct like that of which petitioner was convicted may, in some circumstances, be an offense under the Uniform Code of Military Justice, there is no court-martial subject-matter jurisdiction over such conduct unless it is service-connected. *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Relford v. Commandant*, 401 U.S. 355 (1971). Prior case law gave no notice to petitioner that a court-martial would have jurisdiction to try these of-

fenses; rather they held that such conduct was beyond the reach of court-martial jurisdiction. *Supra* p. 43. Whether the accused was on notice that his acts were offenses under the Uniform Code of Military Justice is crucial because trial by court-martial deprives an accused of important constitutional rights which are guaranteed in civilian courts.

The Government, in its Brief in Opposition, utterly failed to address the point that the establishment of federal jurisdiction, after the fact, violates due process. *United States v. Juvenile*, 599 F. Supp. 1126, 1131-1132 (D. OR 1984). Petitioner has not claimed that due process prevents his being tried altogether. What it does require is that he be tried by the civilian court (in this case an Alaska state court) that had jurisdiction over the offenses at the time they were committed, rather than the court-martial to which jurisdiction was extended by the decision below, after the offenses. *Id.* at 1131-1132.

Juvenile involved a proceeding against a minor in a federal district court. The defendant attacked federal jurisdiction because of improper certification under 18 U.S.C. § 5032. The Government argued that even if its original certification was improper, its amended certification asserting jurisdiction based on an amendment to 18 U.S.C. § 5032, made after the acts involved in the proceeding occurred, was proper. The Court, however, held that the "retrospective establishment of federal jurisdiction violates the *ex post facto* clause." *Juvenile* 599 F.Supp. at 1131. It found that retrospective application of the amended statute to impose federal jurisdiction where it had not existed would disadvantage the juvenile defendant and defeat his defense based on lack of federal jurisdiction. *Id.* at 1131-1132.

Similarly here, the Court of Military Appeals' retrospective application of its expansive interpretation of the reach of the Uniform Code of Military Justice, to the offenses committed by petitioner, has disadvantaged him

by depriving him of a trial in a civilian court, and by defeating his defense of lack of court-martial jurisdiction. This has the effect of an *ex post facto* law and, therefore, violates petitioner's fifth amendment due process rights. For that reason, the decision of the Court of Military Appeals should be reversed.

CONCLUSION

The judgment of the Court of Military Appeals affirming the judgment of the Coast Guard Court of Military Review should be reversed, and the trial judge's ruling dismissing the Alaska offenses for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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